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In the Supreme Court of the United States.

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No. 76.

THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELI MINING & LAND COMPANY, ET AL.,
DEFENDANTS IN ERROR.

Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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I.

STATEMENT OF CASE.

This case is the culmination of a long series of events. On December 14, 1877, A. D., Searl and seven associates made a location of placer land near the new mining camp of Leadville. We will refer to this location as the Searl placer. The claim embraced at this time about 152 acres of land. The original locators

shortly conveyed all their interest to A. D. Searl, who applied for a patent from the local land office on July 5, 1878. The great mining camp of Leadville had in the meantime become fully established, and the lode character of all its mineral lands fully demonstrated, and Mr. Searl was met in the land office with a multitude of adverse claims filed by the owners of conflicting lode locations. As a result of this, various settlements were made, numerous lode claims were excluded, and on March 10, 1882, an amended application for patent was filed, excluding over one-third of the land originally located. The new application was for 101.916 acres. Over one-third of the land was thus conceded to be more valuable for lode than placer purposes, almost at the inception of the claim.

The amended application of March 10, 1882, was met by a number of protests filed in the land office by citizens of Leadville. The ground of these protests was that the location itself was illegal and void, because the land upon which the *placer claim* was located was not *placer land*, and could not be located as such. It was insisted that the land was more valuable for lode mining than for placer mining, and that Searl was endeavoring to acquire title to valuable mining ground under the guise of a placer claim, when it was really intended for townsite purposes or for lode mining claims. The rapidly growing city of Leadville had already overrun a large part of the location. These protests were investigated by the land office, hearings were ordered and had, and all were sustained. The register and receiver of Leadville decided that the location was void because made on land that was not placer in character. This decision was

affirmed by the commissioner of the general land office on March 6, 1886, and the decision of the commissioner was affirmed by the secretary of the interior on November 12, 1890.

It was supposed, of course, the proper authorities having decided that the ground embraced in the limits of the Searl placer was *not placer ground* and could not be located as such, that it was open to location as *lode ground* or for any other purpose that might be found under the statutes of the United States. Accordingly on November 25, 1890, four lode claims, known as the Clipper, Castle, Congress and Capitol were located within the exterior boundaries of what had been known as the Searl placer. These four lode claims by divers mesne conveyances, became the property of the Clipper Mining Company, the plaintiff in error in this suit, and form the subject matter of this litigation. Work was prosecuted upon said lode claims; and they were soon found to be very valuable, and many thousands of dollars were taken from them. The plaintiff in error, as owner of the lode claims, applied to the land office for a patent, and on November 23, 1893, the defendants in error filed an adverse claim as the owners of the old pretended Searl placer. The complaint will be found beginning on page 16 of the printed transcript. It simply set up title to the ground in conflict as a *placer location* pure and simple.

The defendant answered, setting up as its main defenses, *first*, that the action of the land department in holding the land not to be placer ground and not subject to patent as such, was an adjudication binding on everyone; *second*, that the defendant had en-

tered upon the ground in controversy, and located the lode claim upon veins of mineral in rock in places that were known to exist, and *third,* that as a matter of fact the ground in dispute was not placer ground. A demurrer was filed to the first two defenses and thoroughly argued before Hon. M. S. Bailey, one of the district judges of the District Court of Colorado, and by him overruled. The case then came on for trial before Hon. T. A. Rucker, another district judge, and he found the facts to be that a valid placer location had been made and a lode or vein discovered within it and properly located, and gave judgment on the law for the plaintiffs. In rendering his opinion, the judge said he had decided another case on the same facts the other way (Transcript, page 65). The case was taken to the Supreme Court of Colorado, and the judgment of the lower court was affirmed, Mr. Justice Steele dissenting. Upon the law points involved, then, so far as the state courts are concerned, we have one *nisi prius* judge and one justice of the Supreme Court who have sustained the contention of the plaintiff in error, two justices of the Supreme Court the contention of the defendants in error, and one nisi prius judge who has in two cases decided for both parties. This is about as equal a division of sentiment as could be obtained from five judges.

As a part of the transaction, we would call attention to the fate of the balance of the Searl placer as determined in the federal courts and in the land office. Several other lode locations were made within the limits of the so-called Searl placer, and the adverse suits that arose out of them were all tried in the United States Circuit Court for the district of Colo-

rado. Some came before Judge Hallett and some before Judge Riner, and one went to the Circuit Court of Appeals for the Eighth circuit. Both Judges Hallett and Riner and the Circuit Court of Appeals sustained the contention of the plaintiff in error in this case. And in a proceeding in the land office, the commissioner of the general land office and the secretary of the interior both reached the same conclusion. All of the lodes have gone to patent and the placer title held void in every instance.

So that the matter under consideration in this cause has been before the state courts, the United States courts and the department of the interior. The view of the plaintiff in error has been sustained by the United States courts, the department of the interior, and one-half the judges of the state courts. The view of the defendants in error has been sustained by one-half the state court judges, and by them alone. Unfortunately for us, the half of the state court judges consisted of two out of the three judges of the Supreme Court, and we have been compelled to sue out this writ of error.

II.

SPECIFICATION OF ERRORS.

Numerous assignments of error have been filed in this case, but they can all be disposed of by a discussion of these three propositions:

First—Can a citizen of the United States enter the limits of a valid placer location held by possessory title only, and discover and locate a lode found

to be actually existing therein, and not claimed and located by the locator of the placer?

Second—Can a placer claimant file an adverse claim or sustain an adverse suit against the application of the owner of a lode claim for a patent?

Third—Is a decision of the land department of the United States binding upon other tribunals, or can courts re-litigate and determine the same matter in a subsequent proceeding?

Some minor matters can be disposed of incidentally in the discussions of these two propositions.

III.

ARGUMENT.

FIRST.

Can a citizen of the United States enter the limits of a valid placer location held by possessory title only, and discover and locate a lode found to be actually existing therein and not claimed or located by the locator of the placer.

This question has been answered in the affirmative by every court that has passed upon it except the Supreme Court of Colorado, in the case at bar. The Supreme Court of Colorado in an earlier case answered in the affirmative, and in the case at bar was divided in opinion. All text writers have likewise answered in the affirmative. Mr. Morrison, who has issued a new edition of his valuable work upon Mining Rights, since the opinion in this case was published, is

very emphatic in his dissent from its conclusions. He says:

> "But in Colorado the sweeping decision, Steele J. dissenting, has been made that the placer location holds all lodes not known to exist at the time of the location. That no prospector can enter to search for them and that if he does so enter and discover a lode he can not locate it because his location was initiated by trespass.
>
> Clipper Co. vs. Eli Co., 68 Pac., 286.
>
> "This practically gives all lodes to the placer owner and clearly defeats the intent of the act of Congress. The question seems to us more analogous to the case where one owns the surface and another the minerals, in which instance it is universally held that the surface may be entered upon and used to the full extent necessary to find and win the mineral values."
>
> Morrison's Mining Rights (11th edition), page 207.

That the question is squarely involved will be seen from a brief examination of the record. The complaint begins on page 16, folio 30, and simply sets up title in the plaintiffs to a *placer claim*. The answer begins on page 20, folio 37, and expressly recites the finding of the lodes, the fact of their existence and their location within what was claimed to be the limits of the placer. The replication begins on page 29, folio 53, and expressly denies that any lodes

existed within the placer. So we have presented a plaintiff claiming solely upon a placer location, and not only claiming no lodes by location or otherwise, but denying their existence. The court upon these issues found the facts against the plaintiff, and that the lodes, as a matter of fact existed, but as a matter of law, that the defendants could not locate them within the placer. In other words, the question under discussion was answered in the negative. The bill of exceptions is short and commences on page 38, folio 71. The evidence upon this point is contained on two pages. The plaintiffs simply introduced evidence as to the validity of their placer locations, the defendant rebutted this, and proved the discovery, existence and location of its lodes, and introduced the records of the land office to show the finding that the land was not placer. The plaintiff never denied any of these affirmative defenses that were proved. The finding of the court is on page 63, folio 121, of the record. That this issue is clearly presented is shown by the following quotation from the opinion of the Supreme Court:

> "The question, therefore, is presented whether, and if so, in what circumstances, one may, before application for a patent of a prior valid placer location is made, go upon the same for the purpose of prospecting the ground, and thereafter make a location of a lode claim based on a discovery thereafter, and thus made of a vein or lode therein."
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> Transcript of Record, page 68, folio 131.

The court should understand that it is nowhere conceded that the Searl placer ever was for one moment a valid placer location. It is only stated that even though it were the best placer claim ever staked, yet it can not hold a lode or vein that has been discovered and located by another within its limits.

The general relation between lode and placer claimants has been very well discussed by nearly all of the text writers on mining law. We quote the following from Mr. Lindley:

> "That the two classes of mineral deposits, those falling within the designation of lodes, or veins, and those usually called placers, frequently exist in the same superficial area, is a matter of common experience.
>
> "That when so found, they may be held by the same or different persons, is well settled by both judicial and departmental decisions.
>
> "While it is undoubtedly true that a mining location, whether lode or placer, is property in the highest sense of the term, and when perfected, is equivalent to a grant from the government, yet it does not follow that the thing granted is the same in both classes of locations, nor that things reserved from the operation of one grant are likewise excepted from the operation of the other.
>
> "There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former, there is a grant of the exclusive right of enjoyment of the surface and every-

thing within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath the surface. No subsequent locator, either lode or placer, can invade such surface, though he may openly and peaceably enter for the purpose of laying his lines in such a manner as to properly define his extralateral right. On the other hand, lodes found within the placer surface, or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant. Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is to sever them from the body of the public lands, and to deal with them and the land immediately inclosing them as separate and distinct entities.

"The location of mining ground for placer purposes does not effect such severance. The placer claimant may, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation, unless the existence of the lode remains unknown until the application for a placer patent is filed. This right to appropriate the lode must flow from the discovery of the lode. Whosoever first discovers the

lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer, and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to claim it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were on the public domain; provided, always, that such appropriation is made and perfected peaceably and in good faith. In this respect, the same rules of law which govern the location of mineral land occupied or claimed by others under inchoate agricultural holdings are to be applied. We have fully discussed this subject in preceding articles. It is unnecessary to here repeat what is there said."

1 Lindley on Mines, Sec. 413 (2d Ed.).

Mr. Snyder, in his late work, states the same proposition as undoubted law:

"The statute has recognized what the experience of the miner has proved, that it not infrequently occurs that a placer claim may also contain a lode within its boundaries. In such case, each should be located by itself, a separate estate being created in each. The location of a placer claim carries with it no rights to a lode existing therein and known to exist at any time before patent. The lode so existing may be claimed and lo-

cated either by the placer claimant himself or by another locator. Therefore, where such lode is known to exist within the boundaries of the placer at the date of its location, or at such subsequent date as it is discovered, the placer claimant should, in order to protect his rights, if he desires to hold such lode, at once locate and mark the boundaries thereof, as in the case of any other lode location. Failure on his part to do this leaves the lode subject to location by another, regardless of the possession of the placer within which it is contained."

1 Snyder on Mines, Sec. 318.

And Mr. Morrison, in all the various editions of his standard work, has laid down the same rule. In the last, or eleventh, edition we find the statement:

"A lode claim covers the entire surface as well as the veins within it. Before the passage of the mining acts, it had been held (Brown vs. 49 Co., 9 M. R., 600) that a lode location also included float gold below its apex, which had evidently come from that particular vein. It is evident, from the congressional grant of the surface without excepting any form of deposit, that a lode location, made in good faith, upon an ore-producing vein, without the aid of any such decision, would include placer deposits within its lines, both above and below the vein.

"But an unpatented placer claim covers no lodes, and a lode claim may be located

across it. An unpatented mill site, or ranch claim, does not include either veins or deposits of gold or silver. If the holder of such claim discover mineral upon it he should stake and record the same as a mining claim, and he has the same right as a stranger so to do, if he be the first to disclose such mineral value."

Morrison's Mining Rights, page 225 (11th Ed.).

The relations between lode and placer claims can, perhaps, be better understood by taking up the various acts of Congress dealing with them. It will be seen from them, we think, beyond controversy, that lodes are the highest form of property known in the mining law, and may be discovered and located at any time in land that is the property of the United States.

Prior to 1866 the location of mineral lodes belonging to the United States was governed by the local rules and customs of miners. All were trespassers upon lands of the government and subject to its mercy or justice when it chose to act. On July 26, 1866, Congress declared its intentions by passing a crude act that recognized the rights of these trespassers. The act was devoted exclusively to the subject of locating and patenting *lodes or veins of quartz or other rock in place.* Not one word was said with reference to placer locations. This class of claims still existed, if at all, by sufferance. In the eye of the law, the only mineral lands that could be located and patented were

those containing lodes in rock in place. Section 1 of the act provided:

> "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be provided by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The remaining ten sections regulated *lode* locations and patents and water rights.

On July 9, 1870, the act was amended by adding to it six new sections, the first two of which introduced placer claims into the law for the first time. Section 12 of the amended act, which was the first section of the new act, started off as follows:

> "And, be it further enacted, that claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims."

We thus have Congress recognizing lode claims as the standard and afterwards permitting other mineral

lands to be patented in the same way. The court will note the careful language of the above statute. "All forms of deposit, *excepting veins of quartz or other rock in place*" are subject to entry and patent. Veins in rock in place are expressly excepted as a higher and more valuable property right, one that can not be entered or patented under the guise of a claim usually called placer. The court will note that no permission is given to *locate* a placer, but only to enter and patent a placer claim. By implication, the right to locate must exist and must be governed by local law.

Congress proceeded cautiously. In 1872 it amended the mining code by practically re-enacting the laws of 1866 and 1870, with some new changes and important additions. Lode claims still continue to be the standard in most important matters, but placers were also looked after and lodes within placers remembered. Experience had shown that lodes frequently existed within placer claims, and so provision was made for this contingency.

Section one of the new act contained a valuable suggestion of greater wisdom on the part of Congress, and a more accurate use of language. It read:

> "That all valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens," etc.

The court will note that "all valuable mineral deposits in *lands belonging to the United States*" are

declared open to *exploration and purchase*. Under the same section of the act of 1866 it was simply declared that mineral lands of the United States were open to *exploration and occupation*. By the new law, as long as the title to land remained in the United States it was open to exploration and purchase for valuable mineral deposits. Until the United States had parted with its title any citizen was free to explore its lands for these valuable deposits, subject only to the provisions of that chapter. What were those provisions?

Section two regulated the size and location of lode claims. Section three opened with the new and significant language:

> "That the locators of *all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge*, situated on the public domain, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States and the state, territorial or local regulations, not in conflict with said laws of the United States, governing their possessory title, *shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins*," etc.

Here was a new and valuable right conferred. Prior thereto only the *lode* had been granted, and the surface ground carried with it only an easement and other lodes within it were still open to exploration.

But Congress was careful to confine this to *lode locations*. The law may be searched in vain for any statute giving to placer locators this right of exclusive possession.

Section 10 of the new act begins with this provision:

> "That the act entitled 'An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July ninth, eighteen hundred and seventy, shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims."

That is, while new and important changes were being made as to lode locations, their size increased, surface ground added and exclusive possession and absolute title conferred, placer claims remained as they were. They continued "claims usually called placers," and included only "all forms of deposit excepting veins of quartz or other rock in place."

But the next section provided

> "that where the same person, association or corporation is in *possession of a placer claim, and also a vein or lode included within the boundaries thereof,*"

application must be made for each class of ground. This language shows as clearly as words can show

that the possession of the placer claim did not carry with it possession of a vein or lode within its boundaries. The applicant must *also* be in possession of such lode. There can be no possession of a vein or lode without a location. The same person, then, must have a location of each to be in such possession. The language is meaningless unless we give it this construction. A vein or lode is so valuable in the eye of the law that the location of other classes of mining claims does not necessarily carry its possession.

We ask the court carefully to read these various statutes. All of the provisions show that veins or lodes of quartz or other rock in place are the subject of special provisions, the most valuable deposits in the eye of the law, always open to exploration, location and purchase, as long as the land belongs to the United States, and that locations of the same are made superior to all other kinds of locations made.

It follows from the statutes that a lode mining claim can be located within the limits of any inferior class of locations at any time while the legal title to the ground covered by such inferior locations is still in the United States, although a quasi possessory title may be in some individual.

We will call atttention to a number of decisions upon several classes of locations made upon the public domain. We presume that a homestead is, perhaps, as sacred a title as any known to the law, and that a person going on the public domain and attempting to locate a homestead and acquire title thereto will be given every protection that the law can afford; and yet it has always been the rule that wherever a homestead was located upon land which turned out

to contain valuable deposits of mineral any time before patent had been issued to the homestead claimant, that any one discovering such valuable deposits of mineral could locate the same and acquire thereby a better title than that possessed by the homesteader. In other words, since the land attempted to be taken by the homesteader was not agricultural in its character, the person locating the homestead acquired no rights thereto; his possession was in the nature of an illegal possession and could be invaded by any one showing a superior right thereto. The land office will protect such homestead claimant until a hearing is had to determine the title to the land, and if it is determined that it is mineral ground, the locator of the mining claim will be given a preference and the land decreed to him.

Kaweah Colony, 12 Land Decisions, 326.
1 Lindley on Mines, section 202 and following.

Again, lands embraced within an inhabited city or town and occupied as residences should receive whatever protection the law throws around it; yet this court has held that wherever land is included within the limits of an incorporated town which is found to be mineral in its character, at any time before patent finally issues, it may be located as mineral land. The following emphatic language was indulged in:

> "To such claims, though within the limits of what may be termed the site of the settlement or new town, the miner acquires

as good a right as though his *discovery* was in a wilderness."

Steel vs. St. Louis Smelting Co., 106 U. S., 447.

In other words, although a lode or other deposit of mineral may be discovered within the exterior boundaries of a town site, if the title to such ground is still in the United States, the location can be made. And in a later case it was held that even though the land was actually occupied for trade and business, and improvements had been made thereon, the discoverer of a vein of mineral had the right to locate the same, secure a patent thereto, and was not compelled to pay anything for the improvements thereon. In that case the court used this significant language:

"It is upon the alleged prior occupation of it for trade and business, the same being within the settlement or town site of Deadwood, that the defendant relies as giving him a better right to the property. But the title to the land being in the United States, its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for the acquisition of the title under the laws providing for the sale of lands of that character."

Deffeback vs. Hawke, 115 U. S., 392.

And the Supreme Courts of Montana and Arizona and the land office have uniformly held to the

same effect and permitted mining locations to be made on property which had been improved and was actually occupied.

Talbot vs. King, 6 Montana, 76.

Butte City Smokehouse Lode Cases, 6 Montana, 397.

Chambers vs. Jones, 17 Mont., 156.

Tombstone Townsite Cases, 15 Pac. Rep., 26.

In re Rankin, 7 Land Decisions, 411.

And see the very able discussion on this point in 1 Lindley on Mines, section 166, and following.

A railroad grant having been construed by this court to convey no mineral rights, it has always been held that so long as a patent has not been actually issued, the lands are open for exploration for minerals, and all mineral *discovered* subject to location. This rule has been enforced, even where the grant itself was held to convey the title and although the railroad company was exercising ownership over the land and had attempted to sell it to other parties.

Barden vs. Northern Pas. Rd. Co., 154 U. S., 288.

The right to peaceable exploration and discovery always existed. Lands, the legal title to which was in the United States, could be entered for this purpose, hence possessory title did not withdraw the lands from such exploration and discovery.

Indeed, this was regarded as elementary in mining law until the decision of the Supreme Court of

Colorado in the case at bar. The court here attempts to draw a fine-spun scholastic distinction on the word *discovery.* It concedes that a person may go within a placer claim and *locate* a vein, but he can not go and *discover* a vein. We must confess that the distinction is beyond our comprehension, and insist that it is unworthy the court that makes it. If this ruling stands, it deprives the prospector of his dearest right, namely, that of discovering a new mine. It attempts to put a placer location upon the same footing with a lode location. No one is permitted to enter its limits except the owner, and land once located is forever withdrawn from the public domain. As Mr. Morrison well says, *supra,* this "clearly defeats the intention of the act of Congress."

It was never contended that a prospector could make a forcible entry within the limits of a placer claim. No title could be initiated in this manner. But the evidence here shows the entry to have been peaceable, and the location made according to law. We quote the following from the bill of exceptions upon this point:

> "The defendant, to maintain the issues upon its part, then had sworn as witnesses John McNulty, A. C. Saltzman, Frank Fox, J. Lowney, Thomas J. Rinker, J. H. Reed, Duncan McClelland, Joseph Doyle, William Emery, Robert Berry and Timothy Kay. These witnesses testified that they had each examined, or watched others examine, the ground in question from two to three hours each or longer; that the surface of said

ground was covered with wash and debris; that in washing or panning said ground only colors had been found; some of said witnesses testified that said ground was not placer ground, and in their opinion could not be made to pay as placer ground; others of said witnesses testified that they could not express an opinion as to whether said ground was placer ground or not; and the defendant also had sworn as witnesses J. W. Newell, Joseph Doyle, J. K. Carleton, who testified that they had been familiar with the ground since 1880, and that since that time valuable lode deposits had been discovered and known in the region in which this placer is located, and the said J. K. Carleton testified that he believed that there was one large mineral-bearing vein which underlaid the whole of said placer, dipping under the same, that he knew of evidences of said vein extending under said placer from workings in the Lucy B. Hussey and other lodes as far back as 1881; and said Newell, Doyle and Carleton testified that said lode or vein had, since 1895, been traced and discovered under said placer. Said witnesses, together with S. M. Carleton, also testified to the discovery and location of the Castle, Clipper, Congress and Capital lode mining claims; that said claims were located on the 25th of November, 1890; and said Carletons testified that at that time the said mineral-bearing vein was known to underlie said placer; and said Newell testified

that to his knowledge a valuable discovery of mineral in said lodes was made in 1895; and said three witnesses testified that said claims had all had work performed upon them in the shape of a shaft sunk to the said mineral-bearing vein, from which a great many thousand dollars' worth of ore had been extracted and shipped to the smelter; that the discovery shafts had been sunk upon each of said claims, the boundaries had been marked, the location certificates had been prepared and filed as required by the statutes of the state of Colorado, and that the statutes of the said state and of the United States relating to the discovery, location, recording and annual work upon each of said claims had been in all things fully complied with."

Transcript of Record, page 39.

Not one word was introduced to rebut this evidence. The trial court in its finding simply states that the defendants entered the placer claim and discovered a lode claim. This implies that the discovery was made in a legal and peaceable manner. The evidence just quoted shows the defendants were in the uninterrupted possession of the lode claims for years, that they expended thousands of dollars in their development and extracted thousands of dollars of ore from the veins themselves. Now at this late day they are told that, although the placer claimants always denied the existence of the lodes, and do not now claim them as lodes, yet because they originally entered upon a placer claim their location is void. We

submit that such a conclusion is monstrous. It finds no sanction in the mining law.

Many of these conflicts between lode and placer claims have been before this court. In all of them it has been conceded that a lode claim could be located within a placer claim before the latter had applied for a patent. This was the one point upon which all parties seemed to agree. A brief examination of the cases will demonstrate this beyond question.

The first case was that of The Iron Silver Mining Company vs. Sullivan. It came up first on the circuit before Judge McCrary on a demurrer to the answer. The owners of the placer sued in ejectment, and the defendant replied that he was working a lode known to exist when application was made for a patent on the placer. The plaintiff demurred to the answer and insisted that the defendant should have said he had *discovered* his lode and gone within the placer and located it before the placer applied for a patent, and that it was not enough merely to allege that the lode was known to exist. We quote from Judge McCrary's opinion the following:

> "Now, it is a vein or lode such as is described in this section 2320 that is referred to in the provision of section 2333 that I have read, and which we are now to consider. We are referred to section 2320 for a description of a vein or lode, which is referred to in the section under consideration, and we see in reading that section that it describes the location, the metes and bounds, the size, and generally describes, not the lode simply, but a lode claim—one that has been located, which

has boundaries, which has been developed; it gives us its dimensions; it declares it shall have been located; it says it shall be a claim in which there has been a discovery of mineral, etc.

"I am of the opinion that a vein or lode that has never been claimed; that has not been located; that has not been marked out by metes and bounds, and in which there has been no actual development, or, to use the language of the statute, 'discovery of a vein or lode within the limits of the claim located,' is not a vein or lode such as is described in section 2320. The description must refer to these things. The section describes nothing else, and to its description we are plainly referred."

Iron Silver Mining Co. vs. Sullivan,
16 Fed. Rep., 829.

It will be seen from this that even the placer claimant conceded the right to enter a mere possessory placer location and locate a lode claim before the placer had applied for a patent. This was regarded as settled law in the mining states and territories and has been acted upon from that good day to this.

Judge McCrary's decision was reversed by this court upon a construction of the language of the answer and without passing upon the merits of the point involved.

Sullivan vs. Iron Silver Mining Company,
109 U. S., 550.

From that time a long and bitter litigation waged between the owners of the Iron Silver Mining Company and various lode claimants. Several of the cases came before this court:

Reynolds vs. Iron Silver Mining Company, 116 U. S., 687.

Iron Silver Mining Company vs. Reynolds, 124 U. S., 374.

United States vs. Iron Silver Mining Company, 128 U. S., 673.

Iron Silver Mining Company vs. Campbell, 135 U. S., 286.

Iron Silver Mining Company vs. Mike & Starr Co., 143 U. S., 394.

Sullivan vs. Iron Silver Mining Company, 143 U. S., 431.

In all of the cases it was never doubted that the position we here contend for was correct. It was the position insisted upon by the placer owners; it was conceded by the lode owners as far as it went. The law was finally and definitely settled in the Mike and Starr cases, decided in 143 U. S. That was a controversy between the Iron Silver Company as the owner of a placer claim and the Mike and Starr Company as the owner of a lode claim called the Goodell. The Goodell lode claim was located after the placer had applied for a patent. The Goodell was held a good location because upon a lode actually known to exist at the time the placer applied for a patent. The contention of the placer people was that in addition to being known, the lode should have been actually

located. We call attention to the following extract from the dissenting opinion of Mr. Justice Field upon this point:

> "At the close of the testimony in the case the plaintiff moved the court to instruct the jury to find a verdict in its favor, on the grounds, among others, that the Goodell claim of the defendant was not located or recorded until after the application was made for the patent of the William Moyer placer claim, and that there had not been a discovery in the shafts of the defendant of any vein or lode of quartz or other rock in place bearing any valuable deposits. But the court denies this motion, and to its denial exception was taken.
>
> "Among the instructions to the jury the plaintiff then requested the court to give the following:
>
> "1. That the terms 'vein or lode' and 'vein or lode claim,' as used in section 2333 of the Revised Statutes of the United States, mean and refer to vein or lode mining claims which have been discovered, located and recorded within the boundaries of a placer claim before the time when the application is made for the placer patent. And unless the jury find from the evidence that the alleged Goodell lode claim of defendant had been discovered, located and recorded in accordance with the law governing the location and acquiring title to mining claims before the time when the application was made for the said

placer patent, the said lode claim is not excepted or excluded from the grant of the said placer patent, and does not come within the reservation clause in said patent.

"2. That a lode claim located or attempted to be located within the exterior boundaries of a placer claim at any time after the time of making application for the patent to the placer claim gives no right or title; any lode so located is not reserved from the grant of the placer patent. This rule applies to all lode claims located between the time of the application for the placer patent and the making of the entry and the issuing of the patent.

"3. That to constitute a valid title to a lode mining claim the locators of such claim are required to make a discovery of a vein, lode or ledge carrying valuable deposits, within the boundaries of such lode claim, before the same is located and recorded, and if such discovery is not made the location is void and creates no title or right of possession in the attempted locators; and if the said defendants made no such discovery of a vein, or lode, or valuable deposit within the boundaries of the said Goodell lode claim, then they acquired no title or right to possession whatever by virtue of their pretended location.

"But the court refused to give either of these instructions, and to its refusal to each one an exception was taken at the time."

Iron Silver Mining Company vs. Mike & Starr Co., 143 U. S., 394.

And we also quote the following from Mr. Justice Brewer to show that it was conceded that our contention was elementary law:

> "Our conclusions are, first, in respect to the matter of the known vein, that the reasons so clearly stated by Mr. Justice Field, speaking for the court in the case of Noyes vs. Mantle, 127 U. S., 348, 353, are unanswerable, and forbid an adjudication that the term 'known vein' is to be taken as synonymous with 'located vein,' and compel a reiteration of the declaration heretofore made, that the term refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location; and as to the other matter, that the title to portions of this horizontal vein or deposit, 'blanket' vein as it is generally called, may be acquired under the sections concerning veins, lodes, etc."
>
> Iron Silver Mining Company vs. Mike & Starr Co., 143 U. S., 394.

It would be a queer result to hold that an unpatented placer claim conferred greater rights than a patented placer claim, and yet this is the logical result of the decision of the court below. The decisions of this court just cited show that even after a placer claim has gone to patent, a stranger may enter its limit and locate a lode that was known to exist when the patent was applied for. In the case at bar, the placer claimant has no application for a patent, has made no location of the lodes, and in its pleading, de-

nies their existence, and yet the court below takes them away from parties who have actually discovered them, proved their existence and located them according to law. Such another result can not be found in the books.

The conclusions of the text writers and of this court are supported by the decisions of the department of the interior and of other courts. Secretary Smith, in an elaborate opinion, uses this language:

> "As to the effect of the placer locations:
>
> "In your said decision of April 1, 1896, you hold in substance that such a location gives to the locators or claimants under it a right to all veins or lodes included within its boundaries, though not claimed as such, or even discovered at the time; and that such right in the placer claimant can not be affected by any subsequent discovery or location by another, of a lode claim within the boundaries of the placer claim. In other words, a placer claim, once lawfully located distinctively as such, gives to the owner thereof the right to appropriate to his own use and benefit any lodes or veins of mineral-bearing ores, which may thereafter be discovered and located by another within the limits of his claim; and all he will have to do in order to procure title to such subsequently discovered lodes or veins, in the discovery and location of which he took no part, would be to include them in his application for patent when filed, and pay the

additional price per acre therefor as required by law. This I understand to be the logical effect of your said decision.

"It does not appear to me that such is the law. No case has been cited in which the precise question has been decided, nor am I aware of any.

"Under the mining laws of the United States property rights in veins or lodes containing mineral-bearing ores are acquired, in the first instance, by discovery and location. It has frequently been held by the courts that a mining claim, once perfected under the law by discovery and location, becomes property in the highest sense of that term. (Sullivan vs. Iron Silver Mining Company, 143 U. S., 431-434; Belk vs. Meagher, 104 U. S., 279-283.)

"That there can be no valid location of a mining claim without discovery to support it will hardly be questioned. *And a location on account of the discovery of a vein or lode can only be made by the discoverer, or one claiming under him.* If the title to the discovery falls, so must the location which rests upon it. But, if the discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of that location, unless he should abandon his prior right. (Gwillim vs. Donnellan, 115 U. S., 45-50.)

"It is also to be remembered that the two classes of mineral deposits, namely, vein or

lode deposits, and placer deposits, may exist in the same superficial area, and that they may be discovered, located and claimed by the same, or different persons, and patented accordingly. This is not only in accord with the plain import of the statute (section 2333 R. S.), but is also well settled by both judicial and departmental decisions (Reynolds vs. Iron Silver Mining Company, 116 U. S., 687-697; South Star Lode, 20 L. D., 204). The said two classes of mineral deposits are entirely separate and distinct from, and exist wholly independently of, each other. The mining statutes appear to be founded upon the well-known and universally recognized difference in their character. The vein or lode of mineral-bearing quartz is more valuable than the surface and placer deposits, and Congress has accordingly fixed the price per acre, as represented by the superficial area, of the former at $5.00 per acre, and the latter but $2.50 per acre. This was stated in substance by the Supreme Court in the case of Reynolds vs. Iron Silver Mining Company, just cited, wherein the court also said it had been shown by experience that both these classes of mineral deposits might be found in the same superficial area, and that section 2333 of the Revised Statutes makes provision for such a case. That section is as follows:

"'Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the

boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of $5.00 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for a vein or lode claim, shall be construed as a conclusive declaration and the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.'

"This section, as was stated by the Supreme Court in the case of Noyes vs. Mantle, 127 U. S., 348-352, and in other cases, both prior and subsequent thereto, makes provision for three classes, as follows:

"1. When one applies for a placer patent, who is at the time in possession of a vein

or lode included within the placer boundaries, he must state the fact, and then, upon payment of $5.00 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof, and $2.50 per acre for the placer claim, a patent will issue to him covering both the placer claim and the lode.

"2. Where a vein or lode is known to exist at the time within the boundaries of the placer claim, an application for patent for the latter, which does not include an application for the vein or lode, will be construed as a conclusive declaration that the placer claimant has no right of possession to the vein or lode.

"3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for patent, title will be conveyed by such patent to all veins or lodes within its boundaries.

"The present case, if the allegations of the protest filed by Bennett are true, would seem to come within the second of the three classes named, if within any of them. Certainly it does not belong to either of the other two. The original locators of the placer claims, assuming the allegations in the protest to be true, were not, at the date of the placer locations, in possession of the vein or lode, and did not, by their said locations, lay any claim thereto. Theirs were distinctively placer locations. They could not have had any just claim to the lode because, as we

have seen, they were not the discoverers thereof, and could not, therefore, lawfully locate it, or assert any property rights in it. The lode claim was discovered by others; was located by others; and, upon its location, as property under the law, belonged to others. Nor was the present placer claimant in possession thereof at the date of his application for patent, at which time, and long prior thereto, the existence of the vein or lode within the limits of the placer locations, was a well-known fact."

Aurora Lode vs. Bulger Hill and Nugget Gulch Placer, 23 L. D., 95.

A rehearing was denied and the rule affirmed by Secretary Francis.

Same Case, 23 L. D., 348.

The Supreme Court of Montana has announced the same rule in one of its early decisions. We quote the following:

"There is no proof whatever that the respondent was in possession of a vein or lode within the boundaries of his placer application. There is no proof that any such vein or lode existed. The discovery of the Betsey Dahl lode two or three hundred feet outside of such boundaries raises no presumption of the possession of a vein or lode by the respondent within the boundaries of his placer claim. *If said discovery had been*

within said boundaries, and in pursuance thereof a lode claim had been properly located there, then the respondent, in making application for a placer patent, would have been presumed to know of the existence of such lode or vein."

Raunheim vs. Dahl, 6 Mont., 167.

The case was affirmed by this court.

Raunheim vs. Dahl, 132 U. S., 260.

And the Supreme Court of South Dakota has decided the exact point.

McCarthy vs. Speed, 11 South Dak., 362.

Indeed, the Supreme Court of Colorado has decided the point, and in favor of the contention of plaintiffs in error, as we view it.

The Mt. Rosa M. M. & L. Co. vs. Palmer, 26 Colo., 56.

In the case at bar the Supreme Court of Colorado filed two opinions, one on the original hearing and one on rehearing. Our objections to the original opinion were so strong that the court shifted its ground in its opinion on rehearing. In the first opinion it stated the proposition under discussion as though no application for a patent were made by the owners of the placer. In the opinion on rehearing it took refuge behind the abandoned and rejected applications for patent made by the owners of the Searl placer. This is clearly a confession of weakness on the part of the court. We would ask this court to read that portion

of the opinion on rehearing, beginning at folio 164, page 85, of the record. This taking up of a matter never urged even by counsel for defendants in error to sustain a conclusion so at variance with reason and authority should of itself work a reversal of the case. The patent application that the court refers to was rejected by the land department as fraudulent and void. Can such an application be held to be the basis of any rights for the placer claimant? The owners of the placer, in their pleadings or briefs, never predicated any rights upon this fact. The land department, in one of its decisions in this case, expressly held that all that was left to the placer owners was their possessory right growing out of what was left of their location.

> In re Clipper Mining Company, 22 Land Dec., 527.

The Supreme Court of Colorado in this case never thought of this matter in its original opinion. The chief justice, in folio 131, on page 69 of the record, uses this language:

> "The question, therefore, is presented whether, and if so, in what circumstances, one may, *before application for a patent* of a prior valid placer location is made, go," etc.

To fix the date at which a lode must become known to exist or else pass to the placer owner, we must have an application for a patent that is successful. Applying for a patent, and having your application refused, can confer no rights at all. The placer

owners here have never insisted upon any other rights than those of mere holders of a possessory title. No wonder when his colleagues were forced to rely upon this weak support one of the judges of the Supreme Court dissented.

The land department, since the rejection of the application for patent, treats the claim as though no application had been made. While this cause has been pending in the courts, each side has endeavored to secure an entry from the land department. In passing on the attempt of the placer locators, the commissioner of the general land office said:

> "There was only one question before the court, the question of the right of possession to the ground involved, and the court found this to be in the placer claimants, not because they had any right to the lode claims, but upon the new and novel ground that the lode claimants had no right to enter upon the placer location. It is not necessary to the decision in this case to consider the effect of this, the first decision of the courts denying any right to lode locators within the limits of a mere unapplied for placer location, a decision at total variance with the practice or rulings of this office and the land department."

And the secretary of the interior, in affirming this judgment, said:

> "Your office decision of December 20, 1898, considered these entry proceedings and

held that in the adverse claim filed in the local office and in their pleadings in the adverse suit, the adverse claimants rested their right to the land in controversy solely upon their alleged placer claim, and asserted that there were no known veins or lodes therein; and the judgment in the adverse suit awarded said land to them as a part of said placer claim, and not otherwise; that such judgment did not establish in them any right to make a lode entry or receive a lode patent, and that the lode entry should be cancelled as wholly unauthorized. From this decision Searl and his associates, the adverse claimants, have appealed to the department.

"The decision of your office was clearly correct and is therefore affirmed."

Clipper Mining Company vs. Eli M. & M. Co., 29 L. D., 137.

Judge Hallett, in passing upon these same rejected applications, stated both the law and the position of the placer claimants in very clear language. He said:

"No. 3292 is an action of ejectment to recover possession of a mining claim in Lake county, called the Jason lode. The defendant in one answer set up title to what is known as the Searl placer, the defendant being the lessee of the owners of that placer. The plaintiff replied that, upon proceedings in the land office, by which the

owners of the placer claim sought to obtain a patent for the premises, the placer claim was decided to be invalid. The defendant has demurred to this replication, and relies upon the proposition that whatever may have taken place in the land office, the placer claim is still a good location in so far as to enable the defendant to maintain possession of the premises, and to resist any location which may have been made by the plaintiff or any other person on the placer claim. I think this position is untenable. When the placer location was held to be invalid in the land office, it was thereupon void for all purposes; the premises covered by the placer location were public land, and no further proceedings could be had upon that location; the plaintiff, and everyone else, was at liberty to go upon the premises and make another placer location, or a lode location, as they might find the facts to be. This is a question which admits of extensive discussion, and I do not think it necessary to go into it at this time."

The mere statement of the proposition, however, is sufficient. An application for a patent that is rejected as void becomes nothing, and can date no rights from its filing. A reading of section 2333 of the Revised Statutes will convince any one that this must be true. The patent must actually issue to fix these rights, and when issued, it dates back to the application. But the peculiar circumstances under which the court changed its base is sufficient upon this point.

It is not an unusual thing to have a right to enter upon mining land in the possession of third parties for the purpose of securing title under other provisions of the mining law. Lode claims come nearer to exemption than any other class of mining property, because the statute expressly gives exclusive possession. But, even in this case, this court has expressly decided that the lines of a junior location may be run across it and stakes placed upon its surface to secure underground rights.

Del Monte Mining Co. vs. Last Chance Mining Co., 171 U. S., 55.

We would like to incorporate in this brief the entire opinion of Mr. Justice Brewer upon the first point discussed in that case, but will content ourselves with part.

> "The stress of the argument in favor of a negative answer to this question lies in the contention that, by the terms of the statute, exclusive possessory rights are granted to the locator. Section 2322 declares that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location,' and negatively that 'nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.' Hence, it is said that affirmatively and negatively, it is provided that the locator shall have exclusive

possession of the surface, and that no one shall have a right to disturb him in such possession. How, then, it is asked, can any one have a right to enter upon such location for the purpose of making a second location? If he does so he is a trespasser, and it can not be presumed that Congress intended that any rights should be created by trespass.

"We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called, in section 2320 and elsewhere, a 'claim,' or a 'mining claim.' Indeed, the words 'claim' and 'location' are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim, works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other and include the same ground, for then the matter of right becomes a matter of dispute, but no location creates a right superior to any previous valid location. And these possessory rights have always been recognized, and disputes concerning them settled in the courts..

"It will also be noticed that the locator is not compelled to follow the lines of the government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys, but, whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein, and the discoverer desire to take the entire surface, and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

"Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced vein, as is possible.

"Further, Congress has not prescribed how the location shall be made. It has simply provided that it 'must be distinctly marked on the ground so that its boundaries can be readily traced,' leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves—men inexperienced in the matter of surveying—and so in the nature of things, there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities, the posts, stakes or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken,

such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of any prior claim. And in all places posts, stakes or other monuments, although sufficient at first, and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered, naturally many locators hurry to seek, by early locations, to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that, around any new discovery, there quickly grows up what is called a mining camp, and the contiguous territory is prospected and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made, and, indeed, in every mining camp where large discoveries have been made, locations, in fact, overlap each other again and again. (McEvoy vs. Hyman, 25 Fed. Rep., 596-600.) This confusion and conflict is something which must have been expected, foreseen—something which in the nature of things would happen—and the legislation of Congress must be interpreted in the light of such foreseen contingencies.

"Still again, while a location is required by the statute to be plainly marked on the

surface of the ground, it is also provided in section 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to relocation. Now, although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it can not be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is invalid or has failed before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location."

And again he says:

"The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time, the fact is also to be recognized that these locations are generally made upon lands open, unenclosed and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain, and where the valid-

ity of apparent locations is unsettled and doubtful. Under those circumstances, it is not strange—on the contrary, it is something to be expected, and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—go through the form of making a relocation, simply works delay and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines."

The point under discussion, of course, related to parallel end lines, but it is just as pertinent to the case at bar. A placer location simply confers the right of possession to *the placer ground* and confers no possession of the lode ground. The statute itself expressly excludes any other conclusion. Section 2333 says that

> "where the same person, association, or corporation *is in possession of a placer claim,* AND ALSO A VEIN OR LODE INCLUDED WITHIN THE BOUNDARIES THEREOF,"

there can be no escape from the conclusion that the mere possession of a placer claim confers no possession of a vein or lode; the locator of the placer must "ALSO" be in possession of the vein or lode. This lode or vein possession must come from location, as that is the only way under the law that possession can be secured.

And again, a patented lode claim may be entered by a tunnel claimant to secure and work a blind lode.

Campbell vs. Ellet, 167 U. S., 116.

All of the placer mining cases passed upon by this court are based upon this proposition.

In conclusion on this branch of the case, we can only say that the decision of one state court by a division of two judges against one should not be permitted to stand against the unanimous judgment of all the federal courts and the land department. It is not the construction of a state statute or a declaration of the common law as understood in that state. It is the interpretation of a federal law. We have al-

ready called attention to the decisions of the land department, and to Judge Hallett's opinion. Judge Riner's opinion, and the Court of Appeals affirming it, will be found in

Eli Mining & Land Co. vs. Carleton, 108 Fed. Rep., 24.

Surely all the courts and all the text writers can not be mistaken upon this point. Contemporaneous construction of the statute from its passage to this time must be right, unless clearly shown to be wrong. We submit that the position of the Supreme Court of Colorado is wrong upon this point.

SECOND.

Can a placer claimant file an adverse claim or sustain an adverse suit against the application of the owner of a lode claim for a patent?

An answer to this question strikes at the very foundation of this case. It has been already decided by the land department in this identical litigation that the owners of the placer can not get a patent from the government for these *lodes*. What then can they get? The lodes are now known to exist. The owners of the placer even if given a patent for their placer could get no title to the lodes. Who, then, is entitled to the lode claims? These are questions that must be answered. The Supreme Court of Colorado has paid no attention to them. In the case at bar the plaintiffs not only never claimed the lodes in this suit, but have solemnly denied their existence. Now, then, can they dispute the right of another to them?

The court should have given judgment to the defendant on the pleadings, as was prayed for.

The rulings of the land office in this case have already been referred to. When judgment was entered in this cause by the District Court of Lake county the plaintiffs took a certified copy to the land office and had a receiver's receipt issued. This was contested in the general land office by the defendants and the entry was cancelled by the commissioner on Dec. 20, 1898, and this decision affirmed by the secretary of the interior. In his ruling cancelling the entry, the commissioner used this language:

> "There is only one possible way under the U. S. mining laws by which a placer applicant can secure title to known lodes within his placer claim and that is in the manner provided for in section 2333 U. S. R. S., by asserting claim to such lodes in his placer application.
>
> "But it is impossible under the proceedings taken in this case to assert any such claims to the lodes entered. They were not claimed in the placer application, either original or as amended, nor in the adverse suit nor in the judgment based thereon. It is extremely difficult, therefore, to determine by what construction of the mining laws such a claim as is here asserted can be made or defended.
>
> "The entire proceedings in this present case display a remarkable estimate of the purpose and scope of the mining laws by the entrymen. Their placer application for

patent, made without any claim to known lodes, was rejected because of the non-placer character of the land applied for. They proceed, however, to adverse the lode applications, and secure a judgment * * * because of the prior placer location. They now seek under cover of such judgment to secure patent for the lode claims which they denied ever existed. To admit such proceedings would be to place a violent and unwarranted construction on the meaning and purpose of the mining laws.

"The utmost liberality is allowed under said laws to persons seeking title to the public lands, so long as the claims thereto are in good faith and the land covered thereby is subject to disposition under the form of the laws applicable thereto, but there is no place in either the spirit or the letter of the law for cases of this kind. If there are also locations in such placers which are not claimed by placer applicants, it is a perfectly plain proposition that they should be held to be the property of the lode locators. This is the rule of the department and the courts, even including the court which decided this case, which, however, fails to distinguish between the two classes of mineral deposits, lode and placer, which are as sepaarte and distinct as are agricultural and mineral lands.

"However, enough has been stated to show that the entrymen have no right to the

> lode claims under the judgment, nor is the office called upon to consider at this time whether an entry can be made under said judgment for the placer claim. This involves the question of the character of the land, a question which is solely within the jurisdiction of the land department."

In affirming the commissioner, the secretary used the language quoted above from 29 L. D., 137. It was urged by the Clipper Company on that hearing that the land department should disregard the adverse proceedings and issue its patent to the lode claims, but it refused to pass upon the point at that time, leaving the matter entirely with the courts. It is now for this court to say.

An examination of the statutes will convince the court that we are right.

Sections 2325-6 of the Revised Statutes provide the method by which title to lode claims can be acquired. They were formerly sections 6 and 7 of the act of May 10, 1872, and these were substitutes for sections 2, 3, and 6 of the act of July 26, 1866. The act of 1866 related solely to lode claims, and did not permit a placer claimant to apply for a patent under any circumstances. It was not until 1870 that a placer claim was recognized by any act of Congress, and in 1872 the provisions of the act of 1870 were carried into the general mining act.

Lode claims were the only class mentioned under the act of 1866. It is clear, therefore, that the adverse claims contemplated could only consist of conflicting lode claims. Up to 1870 there can be no doubt that a placer claimant could not be heard to adverse a lode

applicant. While placer claims were undoubtedly known to the local laws, and recognized by state and territorial statutes, they were not entitled to patents from the United States, and therefore an adverse would be a nullity.

The act of 1870 only changed this by permitting claims usually called placer to go to patent under like circumstances and conditions as lode claims. Did this addition to the law change the rule as to the relative rank and importance of lode and placer claims? Mineral lands were still the highest and most important lands within the control and ownership of the government. All other claims to land gave way when once its mineral character was established; railroad grants, town-site claims, pre-emption filings, and even the sacredness of the homestead right, were all inferior. And of mineral lands, the lode claim was the standard. Placer claims were expressly made to cover only mineral lands that did not contain veins or lodes of rock in place. A placer claimant could not frame an adverse that would prevent a lode claimant from going to patent unless he alleged that the so-called lode claim contained no lode, but was really placer ground pure and simple, and this would only suggest an inquiry as to the character of the land, a matter wholly within the jurisdiction of the land department, and not the subject of an adverse claim at all.

Powell vs. Ferguson, 23 L. D., 173.
Snyder vs. Waller, 25 L. D., 7.

The law of 1872 did not attempt to change this condition of affairs. It chiefly elaborated the provisions of the acts of 1866 and 1870, and by section 11,

which is now section 2333 of the Revised Statutes, provided for that condition of affairs where land was found to contain both clasess of deposits. It rather emphasizes our position that lodes could only adverse lodes, and placers adverse placers, by providing expressly that possession of a placer claim was not possession of lodes found within it. Lode claims were still the standard and the higher class of deposits. Placer claims could still cover no vein or lode in rock in place. How, then, can an inferior location adverse a superior? Can an agricultural claim adverse a mineral claim? Or a mill-site a lode claim? How, then, can a placer claimant lay claim to a lode claim when the statute says expressly that his placer claim can not cover a vein or lode in rock in place?

The language employed in these various acts is conclusive. The act of 1866, after prescribing certain conditions as to mining claims, says:

> "And in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for the said claimant," etc.

The next section provided that a patent might issue in case no adverse claim was filed, and section 6 of the act provided that whenever any adverse claimants to any mine located and claimed as aforesaid shall appear, all proceedings should be stayed until a court of competent jurisdiction had determined the right of possession. It will thus be seen that in this act it was contemplated that no claim to the mine for which a patent was asked could be heard, unless

it was really adverse and related to that particular mine. The same meaning is carried into section 2325. That section says among other things:

> "*If no adverse claim* shall have been filed, it shall be assumed that an applicant is entitled to a patent, and *that no adverse claim exists*, and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 says:

> "Where an adverse claim is filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings as to publication or notice, and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or adverse claims weighed."

The section then proceeds to state what shall be done, and how patent shall afterwards be acquired. We contend that nothing is contemplated by these sections except claims *which are really adverse*, and that if a claim is filed which is not adverse, or which can not affect the merits of the pending application for patent, no good complaint can be framed in its support. Now, what are the facts when a lode claim-

ant applies for a patent upon a lode claim, and he is met with an adverse claim from a placer location? The lode claimant asserts that he has discovered certain mineral bearing veins or lodes upon the public domain, that he has located the same, complied with the state laws, the local rules and customs of miners, the regulations of the department, and the statutes of the United States, and asks the government to grant to him a patent for these lode claims. He is met with a protest and an adverse claim, which sets up that the protestant is the owner of a placer claim covering the same ground as that embraced within the lode claim. He asserts that he has located and is the owner of that placer claim. Can such a claim be adverse in any sense of the word? Does not the mere statement of the placer claimant put him out of court? Section 2329 provides:

> "Claims usually called placers, including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent."

From the moment the placer claimant goes upon record, saying that he is the owner of a placer claim pure and simple, does he not expressly say that his claim does not include any other form of deposit, except a placer deposit? And does he not expressly say that he claims no veins of quartz or other rock in place? If this is true, how can his claim be adverse to the application of the lode claimant?

We concede, of course, that if the placer owner claimed title to the lode, he would have to adverse. But his adverse then would have to be based upon a

claim that he had also located a lode within the limits of his placer, or that the lode applied for had passed to the placer owner by virtue of its being an unknown lode when the placer owner had applied for a patent. If the placer owner had obtained his patent he would not be compelled to file his adverse.

It is only of late years that the true distinction between lode claimants and placer claimants has begun to be realized. A number of late decisions of this court have made this matter clearer than it ever was before. The profession and miners are beginning to understand the clear distinction between the two classes of claims. As already noted, it has been finally settled by this court that when a placer claim applies for a patent, and says nothing about lodes, the owner of a known lode need not file an adverse claim, and that his rights are fully protected.

Iron Silver Mining Co. vs. Mike and Starr Co., 143 U. S., 394.

This is the latest expression of opinion, and reviews all the cases. And it has been settled by the land department that when a lode claimant applies for a patent and is met with a placer adverse and the placer claim wins in the courts, that it only becomes entitled to the placer ground as such, and the judgment does not prohibit the lode claimants from securing title to their lodes.

Aurora Lode vs. Nugget Gulch Placer, 23 L. D., 95.

That the adverse claim must be really adverse in character has been settled in numerous cases. Thus

It has been decided that where a tunnel has been located, and a lode claimant afterwards applies for a patent for ground along the line of the tunnel, that the tunnel owner need not file an adverse claim to protect his rights.

Enterprise Co. vs. Rico-Aspen Co., 167 U. S., 108,

the court concluding its opinion in that case with these words:

> "And as the defendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and, therefore, nothing lost by a failure so to do."

The Supreme Court of Colorado has decided that the owner of an easement need not file an adverse claim to protect it. The court stating in so many words that such a claim was not the subject of an adverse suit, as it was fully protected by the provisions of the federal laws.

Rockwell vs. Graham, 9 Colo., 36.

If any right which is fully protected by the law is not the subject of an adverse claim, it follows that a placer claim is not entitled to adverse a lode claim, for any rights which a placer claim may have are fully protected by the laws.

The Supreme Court of Montana has also held that a person owning a highway over a mining claim need not file an adverse when the mining claim owner applies for a patent.

Murray vs. City of Butte, 7 Montana, 61.

And the same court has held that a mine owner need not adverse an application for a town site.

Silver Bow M. & M. Co. vs. Clark, 5 Montana, 378.

O.

Mr. Lindley has made a careful collection of all the cases.

2 Lindley on Mines, secs. 717 *et seq.*

This court in the various placer mining cases that have been before it has emphatically announced the same rule. We have already called attention to the case of tunnel claims. In one of the Iron Silver Mining Company cases it used this language:

> "It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but throughout the whole of these sections and the original statute from which they are transferred to the revised statutes, the words 'claim' and 'claimant' are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent. And the purpose of the

statute seems to be, that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these *claimants* shall have the patent, the final evidence of title, from the government. This view is consistent with the entire statute on the subject, and some of its language is inconsistent with the idea that any contest to be thus decided is between a party who already has the legal title to the property which he claims and some other party who is only setting up a claim to the same property."

Iron Silver Mining Co. vs. Campbell,
135 U. S., 286.

And, again, it has held contrary to some earlier rulings of the land department that one co-tenant need not adverse an application for a patent made by his co-tenants, the court saying that the statute contemplated conflicting mining locations, and not contests as to the ownership of one location.

Turner vs. Sawyer, 150 U. S., 578.

The same point was decided some years earlier by the Supreme Court of Colorado.

Doherty vs. Morris, 11 Colo., 12.

Mr. Lindley, in his work on Mines, the only philosophical work that has ever been written upon the subject, takes the position that a lode claimant can not adverse a placer claimant, and *vice versa,* that a placer claimant can not adverse a lode claimant. We quote the following from Mr. Lindley's work:

> "Where an application for a patent for a lode within the limits of a placer is made by a lode claimant, if the placer claimant asserts any right to the lode, he is necessarily called upon to adverse. Where his claim, however, is placer, pure and simple, under which claim he can not lawfully assert a right to the lodge, he has nothing upon which to base an adverse claim. If he disputes the existence of a lode within the limits of his placer, the assertion involves the character of the land—a question to be passed upon preliminarily by the land department, and ultimately by the courts, where the issue may be raised in any appropriate action other than those brought to determine adverse claims, under section twenty-three hundred and twenty-six of the Revised Statutes. These deductions logically follow from the principles announced in the preceding section."
>
> 2 Lindley on Mines, sec. 721.

The decisions of the land department are as conclusive and to the same effect. It is held than an agri-

cultural claimant can not file an adverse against a mineral claimant.

Powell vs. Ferguson, 23 L. D., 173.

So the owner of a mill site is not entitled to file an adverse claim again a mineral applicant. We quote from that decision the following:

> "It appears that the Rainy Day mill site was 'located' in 1878, but so far as the record shows no attempt has ever been made to secure a patent for the same. In 1889 the Waller lode claim was located, which conflicts with the mill site. As a result of the hearing had, it was decided that the land was mineral in character, and this judgment became final. The character of the land is therefore finally settled as mineral. Hence it follows that it can not be entered as a mill site. (Alta Mill Site, 8 L. D., 195.)
>
> "The adverse proceeding contemplaed by the statute is for the purpose of determining the right of possession as between parties claiming conflicting mining claims, and does not, in my judgment, comprehend a suit in the courts to settle the question as to the character of the land. That subject is one that is exclusively within the jurisdiction of the land department, and any judgment of a court on this question would not be, necessarily, binding on the department. (Alice Placer Mine, 4 L. D., 314; Powell vs. Ferguson, 23 L. D., 173.)

"Where the character of the land is involved to the extent that the determination of that question fixes the right to purchase the same, it can only be decided by the executive branch of the government, which is clothed with the power to determine the question. It follows, I think, that there is nothing for the court to determine under the adverse that would aid the department in deciding to whom the patent should issue."

Snyder vs. Waller, 25 L. D., 7.

See, also,

Elda M. & M. Co. vs. Mayflower Gold M. Co., 26 L. D., 573.

Cape May M. & L. Co. vs. Wallace, 27 L. D., 676.

A still later case decides practically the identical point. A patent was issued by the department to the Noyes placer in Montana. After the placer had been located, but before patent was applied for, the South Star lode claim was located. The South Star afterwards applied for a patent upon a portion of its ground, and after considerable controversy was successful. The balance of the South Star lode claim was then located as the North Star lode, and a patent was asked upon this North Star lode. Within the time mentioned by statute a protest and adverse claim was filed on behalf of the Noyes placer, and an adverse suit commenced in the District Court of Montana. This case was finally pushed to judgment and decided in favor of the North Star claimant, who

then presented his judgment roll and asked for a patent thereon. The department held that it was not a proper case for an adverse claim, saying upon this point:

> "The so-called adverse claim and suit of the placer patentees were intended to be in conformity with sections 2325 and 2326 of the Revised Statutes, which, as a part of the proceedings to obtain patent to a mining claim, provide for judicial determination of the possessory right to ground embraced in conflicting mining claims. These proceedings were commenced prior to the decision (April 28, 1890) by the Supreme Court in the case of Iron Silver Mining Co. vs. Campbell (135 U. S., 286), and, presumably, upon the theory that it was incumbent upon the placer patentees to take such action in order to protect their rights against the application of the North Star lode claimants. In the case cited, however, the Supreme Court held that the statutory provisions relating to adverse claims apply only where there are adverse claims to the same unpatented mining ground, and that they do not apply to one who 'had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States; had established his right to the land claimed by him, and received his patent.'
>
> "The suit instituted in the local court by the placer patentees against the North Star lode claimants was, therefore, not an ad-

> verse proceeding within the purview of the statute, and the judgment rendered therein, while entitled to great respect, can not be accorded the conclusive effect which attaches to a judgment rendered in an adverse proceeding such as is contemplated by the statute."
>
> North Star Lode, 28 L. D., 41.

We can not conceive of any distinction between the rule here laid down and that for which we are contending. A placer patent confers no greater rights upon a placer owner than a placer location, so far as lodes are concerned, except that the patentee is entitled to all lodes not known to exist at the time the patent was applied for. How, then, can the owner of a placer who has no application for a patent pending, and whose previous applications have been rejected as fraudulent and void, be heard to set up his placer title against a lode located within the limits of his placer claim? Not a single authority, or even dictum, can be cited against our position on this point.

THIRD.

Is a decision of the land department of the United States binding upon other tribunals, or can courts re-litigate and determine the same matter in a subsequent proceeding?

This brief has already reached such a length that but a short space need be given to this proposition. But the point has been so often decided that it will only be necessary to call attention to the cases.

The record here shows that in the trial of the cause the defendants relied upon two decisions of the land department concerning the Searl placer. One was by the commissioner of the general land office, holding the placer claim void because it was located upon non-placer land. The other was by the secretary of the interior, affirming the ruling of the commissioner. The land office record will be found in the transcript, beginning on page 40, at folio 75, and running over to page 63. The opinion of the commissioner begins on page 55, and of the secretary on page 60. The substance of these proceedings is that Searl applied for a patent, and his application was rejected, because the department, after a trial, found the land was not subject to entry as a placer claim.

The defendants pleaded these proceedings as a defense to the suit, and offered them in evidence for the same purpose. The plaintiffs demurred to the defense and the demurrer was overruled. Under this ruling the introduction of the proceedings in evidence should have ended the case, as it was a complete substantiation of the defense; but another judge presided at the trial, and he completely ignored this feature of the case.

The Supreme Court of Colorado affirmed the ruling of the trial court upon the theory that a rejected application for a patent was nothing more than judgment of non-suit, and did not settle finally the character of the land. In this case, it insisted that the only finding was that at the time of the application for a patent, the land was not placer. It relied upon a dictum of Secretary Smith, in 22 L. D., 527, and a judgment of its own in the case of Beals vs. Cone,

27 Colo. The case of Beals vs. Cone has since been before this court, and was dismissed for want of jurisdiction.

We recognize the force of the decision of the Supreme Court, and of the doctrine of Secretary Smith, but can not believe they are applicable to the facts of this case. The same point was fully argued before Judge Hallett, and again before Judge Riner. We have already called attention to the conclusions of these jurists sustaining our position. But to get the matter before the court, we will again quote their language. Judge Hallett said:

> "The defendant has demurred to this replication, and relies upon the proposition that, whatever may have taken place in the land office, the placer claim is still a good location in so far as to enable the defendant to maintain possession of the premises, and to resist any location which may have been made by the plaintiff or any other person on the placer claim. I think this position is untenable. When the placer location was held to be invalid in the land office, it was thereupon void for all purposes; the premises covered by the placer location were public land, and no further proceedings could be had upon that location; the plaintiff, and everyone else, was at liberty to go upon the premises and make another placer location, or a lode location, as they might find the facts to be."

Judge Riner said:

> "Case No. 3846 argued yesterday. In my judgment the evidence in this case does not show that the ground in controversy is placer ground. I think, too, the good faith of the parties making the placer location, and their grantees, may be well doubted. The location was made twenty-three years ago, and no effort has been made by them to develop and work the claim as a placer. Neither is it established as a fact by the testimony that the necessary assessment work has been performed. The views just expressd seem to be in harmony with the findings of the land department, but, if it were otherwise, it could make no difference, as the findings of that department must be held to be conclusive upon the questions of fact; that is to say, as to the character of the land, etc. A judgment will be entered in favor of the defendants."

So we have the views of these distinguished judges of the federal bench, opposed to the views of two of the judges of the Supreme Court of Colorado.

But the distinction between the case of Beals vs. Cone and the case at bar, and the fallacy of the position of the Supreme Court of Colorado, can be easily detected. An application for a patent may be rejected upon one of two grounds: First, something that destroys the entire claim; or, second, something that only affects the patent proceeding itself. For instance, the statute requires the applicant to have a perfect possessory title, to have his claim surveyed

by the surveyor general, and to have completed at least five hundred dollars' worth of work. If it should appear that the five hundred dollars' worth of work had not been done, or the surveyor general had not made a good survey, the patent application would be rejected for this reason. This would come under our second class mentioned above, and would not affect the applicant's possessory title. His *location* would remain good, and he could get a proper survey, or do his work and apply again for his patent. But if the application complies with the law and the patent is denied for some reason that sweeps away the entire claim of the applicant from its inception, then we insist that his rights must end. And surely an adjudication that the land is not subject to entry as mineral land puts an end to any claim that might exist, based on a mineral claim. A finding by the land department that a placer claim had been located on nonplacer land is surely an end to that claim.

The Beals vs. Cone case comes within the second class of cases. There an application had been rejected because of some defect in the discovery shaft, and afterwards on a second application it was found that this defect had been corrected. If the finding in the first instance had been that the land was not mineral at all, this would have settled it.

The matter determined in Searl's application for a patent was the character of the land. It has been decided by the land department, and the decision affirmed by this court, that the land department must finally determine the character of public land, and that even though, in an adverse suit, where the jurisdiction was undoubted, this question was involved, yet afterwards the land department had the right to

say whether or no the land could be sold under the classification made in the adverse suit.

Alice Placer Mine, 4 L. D., 314.

Perego vs. Dodge, 163 U. S., 160.

And in the late case of

Powell vs. Ferguson, 23 L. D., 173,

it was held that any adverse suit which only had for its object an adjudication respecting the character of the land could not be maintained, as this question had to be determined solely by the land department.

This is undoubtedly the law.

Snyder vs. Waller, 25 L. D., 7.

Aurora Lode vs. Bulger Hill Placer, 23 L. D., 95.

2 Lindley on Mines, Sec. 765.

This court has also decided in any number of cases that the decisions of the department on questions of fact are conclusive, and can not be reviewed, annulled or set aside in any other tribunal.

Bishop of Mesqually vs. Gibbon, 158 U. S., 155.

It says in a later case:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether,

for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it can not be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. John vs. Towsley, 13 Wall., 72; Smelting Company vs. Kemp, 104 U. S., 636; Steel vs. Smelting Company, 106 U. S., 447; Wright vs. Roseberry, 121 U. S., 488; Heath vs. Wallace, 138 U. S., 573; McCormick vs. Hayes, 159 U. S., 332."

Burfenning vs. Chicago, St. Paul R. R. Co., 163 U. S., 321.

We have, therefore, an adverse claim presented which, upon its face, can possibly call for no adjudication except as to the mineral character of the land embraced within a so-called placer claim, which question has already been decided by the department. Suppose, as actually happened, that the court should decide contrary to the previous rulings of the land department. Would the land department be bound by, or would it follow, this decision of the court? These questions have all been answered in the authorities to which we have just called attention. The department, while giving to the judgments of all courts of record the very highest consideration, will say that upon these subjects, which are within its exclusive jurisdiction, it must decline to be bound.

The ruling of Secretary Smith in 22 L. D., 527, is only a dictum. He had already given sufficient reasons for his conclusion and this sentence was added to his opinion without any necessity.

He says that the decision as to Searl's application only went to the extent of cancelling his application for a patent, and did not affect his possessory rights. It seems to us that this statement is, upon its face, an absurdity. A man locates a placer claim upon *non-placer land*. The fact of its non-placer character is determined in a solemn adjudication by the proper tribunal appointed for that purpose. The locator remains upon the land and insists upon his placer title. Has such a person a possessory right in any sense of the word? Suppose that an agricultural claim is located upon mineral land and the mineral character of the land is determined by the government. Could it possibly be said that the agricultural claimant still has a possessory right? The decision that the claim is void in its inception, for the reason that it is made upon land which under no circumstances could be patented or claimed under the classification sought, destroys every vestige of title, possessory or legal.

In the first place, the old distinction between possessory and legal titles, so far as mining claims are concerned, is fast disappearing. We call attention to the following language of the Supreme Court of Montana:

> "The easement so granted by virtue of a location in pursuance of the law is the right to the possession, and the right to purchase when the law has been fully complied with. The location is the foundation of the posses-

sory title, and possession under it, as required by the law and the local rules and customs, keeps the title alive. The government holds the superior title in trust for the person so holding the possessory title until, by complying with the law, he may acquire the full title.

"But this easement or grant to the locator can not be severed or divided. Being made up of the possession and the right to purchase, if the right to the possession fails, the right to purchase is gone; and if the right to purchase is defeated, the right to the possession can not be maintained. So, therefore, the person making the location, and his grantees, who only succeed to his rights, must have the capacity both to possess and to purchase; otherwise the grant of the government becomes divested and the ground again open to location. There can not be such a location under the law as entitles the locator or his assignees to the possession without the right to purchase, nor to purchase without the right of possession. Possession and the right to purchase go together. They are parts of the same grant, which is a unity, and which becomes vested by the act of location. Therefore, the right to the possession can not be transferred to any person who is incapable of causing his possessory right or title to ripen into a full title by purchasing from the government. Such a person could not so occupy and possess; he could not so comply with the law

> and the local rules and customs as to preserve his right to the possession, because such right can only be kept alive by being linked to the right to purchase. Possession under a location is preliminary to a purchase, and can only be of that character. It is one step in the possession by which the government parts with its title to the purchaser. And so he who takes possession under a location, or he to whom such possession is transferred, must be capable of becoming a purchaser from the government, for such possession is part of the purchase. If, therefore, possession is transferred to one who, under the statute, is incapable of becoming a purchaser from the government, such possession, being part and parcel of the purchase, is illegal, and such transfer of possession is equivalent to abandonment, and opens the ground to location and possession by anyone capable of making and holding the same."
>
> Tibbitts vs. Ah Tong, 4 Montana, 526.

And, in the same volume, in the case of Noyes vs. Black, page 527, the court says:

> "This is a case of actual possession against a valid location. The plaintiffs, by virtue of possession alone, attempt to hold mining ground as against a valid location of the same ground. This they can not do."

This court has settled the question beyond a doubt. It says:

"The next inquiry is whether the attempted location in December became operative on the first of January so as to give Belk an exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

Belk vs. Meagher, 104 U. S., 279.

See, also:

Horswell vs. Ruiz, 67 Cal., 111.
Lelande vs. McDonald, 2 Idaho, 283.
Gwillin vs. Donnellan, 115 U. S., 45.
Noyes vs. Mantle, 127 U. S., 348.
Kendall vs. San Juan Co., 144 U. S., 658.
Manuel vs. Wolff, 152 U. S., 505.

If there is no location there can be no possession under it. How can a placer claim be located upon non-placer ground? The very foundation of the location was taken away by the decision of the department. It has frequently been decided by the department that after there has been a determination of the character of the land, an application to enter it under a different classification will be denied. Perhaps the latest instance of this will be found in the case of

Coleman vs. McKenzie, 28 L. D., 348.

The entire opinion in that case is very instructive. A hearing had been had in 1882, at which it

was determined that the land was mineral. The mineral claimant, however, failed to patent the land or taken any further steps in regard to it. In 1893 a homestead application was filed upon part of the land, and on March 13, 1896, a new hearing was ordered to determine the character of the land, and finally, on March 4, 1897, the register and receiver rendered an opinion that the land was valuable only for agricultural purposes, and on appeal to the commissioner of the land office this decision of the register and receiver was affirmed. The mining claimants then appealed to the department. The department held that it was error to order a hearing upon the character of the land; that the hearing of 1882 settled this question; it became *res judicata*, and could not be opened merely by an application to patent a portion of the land as a homestead and a mere statement that it was agricultural and not mineral. The various decisions of the department in similar cases were gone over, and we think the reasoning is conclusive. We quote the following from the opinion:

> "A mistake was made by your office in giving to the decision of the department merely the effect of a mineral return, and allowing the homestead claimants to make entry of the land upon the mere filing of a non-mineral affidavit.
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> "Here there had been not only a mineral survey, but also a contest between mineral and agricultural claimants. The character of the land had been put in issue, a large amount of testimony had been submitted on that point, and after consideration thereof the department held the land to

be mineral in character. The effect of that decision could not be overcome or impaired by the mere allegation that the land contained no valuable mineral; nor could the mineral claimants be called upon to again sustain the mineral character of the land upon a mere repetition of the allegation made by the original agricultural claimants that it is not mineral land. (Stinchfield vs. Pierce, 19 L. D., 12; Dargin *et al.* vs. Koch, 20 L. D., 384; McCharles vs. Roberts, 20 L. D., 564; Mackell *et al.* vs. Goodsell, 24 L. D., 553; Leach *et al.* vs. Potter, 24 L. D., 573; Town of Aldridge vs. Craig, 25 L. D., 505; Wilson vs. Davis, 25 L. D., 514.) To secure a hearing whereby the effect of that decision might be overcome it was necessary for the agricultural applicants to allege that exploration and development subsequent to the former hearing or trial had shown the land to be non-mineral, or that the former decision was based upon fraud or mistake such as would justify further inquiry into the character of the land. At such a hearing proof of the abandonment of the mining claim would have been a circumstance tending to show that the mineral claimants deemed the land worthless for mining purposes. In the case of McCharles vs. Roberts, *supra*, it is said that abandonment of the mining claim must be alleged and proven to avoid the effect of a former decision holding the land to be mineral, but a more accurate statement of the matter is that the

> allegation and proof of abandonment are material only in so far as they tend to disclose the estimate placed upon the value of the land for mining purposes by one who has been engaged in the exploration thereof, and who was most interested in sustaining its declared mineral quality."
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> Coleman vs. McKenzie, 28 L. D., 348.

Would not the department have reached the same conclusion if the decision in 1882 had been that the land was not placer ground, and someone in 1895 had attempted to locate it as a placer claim? The case at bar, however, is even stronger than this. Here the original applicant for a patent, whose application has been rejected because it was based upon a placer claim located upon non-placer land, is again at the bar of justice, not claiming any new discovery, not insisting that he has since demonstrated that the land is valuable, not asking for a rehearing, but simply ignoring the ruling of the department.

The point made by the Supreme Court that the parties are different does not apply. An application for a patent, as stated by Judge Brewer, is a proceeding *in rem*.

Wight vs. Du Bois, 21 Fed. Rep., 693.

The government is the owner of the land, and invites all persons to enter upon it and purchase under certain conditions. If one person enters and fails to comply with those conditions, this fact can be availed of by anyone else who attempts to comply. The *government* is always a party to these proceedings and acts as trustee for all parties concerned. The first

application of Searl was a controversy between Searl and the government acting as trustee for certain parties who had filed protests, and everyone else concerned. This controversy is between Searl and the government acting as trustee for the Clipper Mining Company and all parties concerned. The fact that it takes the form of an action of ejectment between Searl and The Clipper Company does not alter the situation. The Clipper Company derives its title from the government, who was a party to the first controversy.

But the first proceeding was *in rem*. It established the *status* of the land. Searl advertised his application to the world and had a public hearing and was defeated. The proper tribunal on this hearing established the status of the land as such. It was the same kind of a proceeding that an admiralty court takes when it fixes the *status* of a ship, or a divorce court when it fixes the *status* of a marriage. The decree is always admissible to prove these facts. So this finding of the land department should have been admitted to show the character of the land, and should have been held conclusive.

We have now gone over all the points of the case, and we submit upon reason and authority the decision of the Supreme Court of Colorado should be reversed. We submit that this court should sustain the position of the federal courts, the land department, and of all the text writers.

Respectfully submitted,

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